86-588

Supreme Court, U.S.
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CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AETNA CASUALTY & SURETY COMPANY,
a Connecticut Corporation,
Petitioner,

v.

SMITH PLUMBING, INC., an Arizona Corporation,
dba WHITE MOUNTAIN SUPPLY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

The White Mountain Apache Tribe contracted for the construction of an Indian housing project on its reservation. The Tribe obtained a performance-payment bond from petitioner Aetna Casualty and Surety Company. Under general principles of suretyship and collateral estoppel, the tribe will be bound by any judgment against Aetna on the bond. In a question of first impression a closely divided (3-2) Arizona Supreme Court upheld state court jurisdiction of a materialman's claim against the surety for the tribe.

THE QUESTION PRESENTED IS:

Whether the exercise of state court jurisdiction over tribal sureties for claims which the state court could not entertain against the tribe itself, infringes on tribal self-government where the state court adjudication would bind the tribe, both legally and practically.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Aetna Casualty and Surety Company, a Connecticut corporation, and the respondent, Smith Plumbing Company, Inc., an Arizona corporation, doing business as White Mountain Supply Company.

RULE 28.1

Pursuant to Rule 28.1, the parent company of petitioner, Aetna Casualty and Surety Company, is the Aetna Life and Casualty Company, a Connecticut corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner Aetna Casualty and Surety Company respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Arizona State Supreme Court entered in the above entitled proceeding on July 15, 1986. 1/

OPINIONS BELOW

The Opinion of the Supreme Court of the State of Arizona is reported at 720 P.2d 499 (Ariz. 1986). The Slip Opinion is reprinted in the Appendix hereto, p. 1a, infra.

The Opinion of the Arizona Court of Appeals is reported at 720 P.2d 510 (Ariz.App. 1984). The Slip Opinion is reprinted in the Appendix hereto, p. 56a, infra.

1/ Though petitioner Aetna Casualty and Surety Company is the nominal party before the Court, the White Mountain Apache Tribe pursuant to a tribal council resolution to indemnify Aetna, has borne the cost of representation since 1980.

JURISDICTION

The Judgment and En Banc Opinion of the Arizona Supreme Court was entered May 28, 1986. A timely Motion for Reconsideration was filed June 12, 1986 and was denied July 15, 1986. This Petition for Writ of Certiorari is filed within ninety (90) days of that date.

The jurisdiction of this Court to review the Judgment of the Arizona Supreme Court is invoked under 28 U.S.C. §1257(3).

STATEMENT OF THE CASE

The White Mountain Apache Tribe is a tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476 et seq., and occupies a reservation in east central Arizona, known as the Fort Apache Indian Reservation. In 1963 the tribal council created the White Mountain Apache Housing Authority pursuant to a requirement of the Indian Housing Division of the United States Department of Housing and Urban Development (HUD) in order to receive financial

assistance from HUD to build low-income housing on its reservation. The Housing Authority is a tribally created entity and has the power to contract and to borrow money from HUD for the purpose of developing housing for its tribal members on the reservation.

In 1968 the tribal council created the White Mountain Apache Development Enterprise (Development Enterprise) for the purpose of undertaking construction projects on the reservation. Development Enterprise is an economic subsidiary of the White Mountain Apache Tribal Government. In 1978 the Housing Authority entered into a general construction contract with the tribe dba Development Enterprise to build four low-income housing projects financed by HUD.

Pursuant to HUD regulations, Development Enterprise was required to obtain a general contractor's performance-payment bond for each construction contract. Four such bonds were obtained from petitioner Aetna Casualty and Surety Company. The provisions of the

bonds are on standard form documents prepared by HUD and they bind the tribe as general contractor and its surety, Aetna, to the Indian Housing Authority, as owner of the projects, in the amount of the original contract sums. The bonds also contain the standard conditions guaranteeing payment of wages and materialmen on the projects.

The tribe was required by Aetna to pass a council resolution agreeing to indemnify Aetna for any payments made pursuant to the performance-payment bond in the event that it failed to pay all project labor and material costs.

The tribe dba Development Enterprise then entered into a subcontract with G,S&D Plumbing, a private non-tribal business, to supply all plumbing materials and labor for installation in the housing projects. Respondent Smith Plumbing Company, Inc. (Smith), a wholesale plumbing supplier in Lakeside, Arizona, outside the reservation boundaries, supplied G,S&D with plumbing supplies for the

Indian Housing Projects on open account for a number of months.

A dispute in respect to alleged non-payment of plumbing supplies arose between the tribe, G,S&D and Smith culminating in an action filed by Smith in the United States District Court for the District of Arizona against G,S&D Plumbing, the White Mountain Apache Tribe as general contractor, and Aetna.

The action was dismissed for lack of subject matter jurisdiction.

Smith then filed an action in the Arizona Superior Court against the Tribal Housing Authority on the basis of unjust enrichment, and against the Housing Authority and Aetna on the performance-payment bond.

Aetna and the Housing Authority, represented by the tribe's general counsel, filed a Motion to Dismiss the Complaint for lack of personal and subject matter jurisdiction.

This motion was denied by the trial court. 2/

The tribe was then allowed to intervene in the action to assert the federal interests which are the subject of this Petition. Some months later Smith voluntarily dismissed the action as to the Housing Authority only.

Thereafter, the trial court dismissed the action as to Aetna and the tribe holding that it lacked jurisdiction over the tribe and its agencies and that the action against Aetna could not proceed in the absence of the Indian Housing Authority. See p. 85a, infra.

Smith appealed but challenged only the dismissal as to Aetna. Concluding that Smith had waived any claim of error in the trial court's dismissal of the tribe, the Arizona

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2/ This motion raised for the first time in the State Court proceedings the federal question whether the State Superior Court could properly exercise jurisdiction over an Indian tribe's surety for alleged non-payment by the tribe of a materialman to a reservation housing construction project. See p. 88a, infra.

Court of Appeals affirmed that portion of the trial court's order. See p. 63a, infra. The court, however, reversed the dismissal as to Aetna holding that the action could proceed against Aetna without joinder of the tribal enterprise.

The Court of Appeals rejected Aetna's argument that an action in state court against the tribe's surety on the performance-payment bond, in fact, constituted a suit against the tribe prohibited by the federal doctrine of tribal sovereign immunity and the proscription against state infringement of tribal self-government. Instead, the Court of Appeals concluded that the suit by Smith was "in essence . . . a suit by a non-Indian corporation on a third party bond issued by another non-Indian corporation." See, pp. 71a-72a, infra.

The court found no basis for preemption of state court jurisdiction over what it characterized as "a private cause of action in contract between two non-Indian parties", nor

any infringement upon tribal self-government. See p. 73a, infra.

It further held that Aetna, the tribe's surety, could not raise the defense of tribal immunity from suit in state court as that defense was not jurisdictional but personal, and therefore, fell within the exception to the general rule of surety law that a surety may raise any defense available to the principal. 3/ See pp. 78a-83a, infra.

The Arizona Supreme Court granted review and affirmed and supplemented the Decision of the Arizona Court of Appeals. The majority agreed with the Court of Appeals that by hearing the merits of the case, the state court would not usurp the legitimate exercise of tribal court jurisdiction, violate the

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3/ The Court of Appeals suggested that if Aetna sought indemnification against the tribe in tribal court for any judgment of the State Court, the tribe could simply raise the defense of sovereign immunity as a defense. This suggestion is unacceptable to Aetna and the tribe. See p. 70a., infra.

doctrine of tribal sovereign immunity or infringe upon tribal self-government.

Two of the five justices vigorously dissented on the grounds that the majority both misconstrued the ultimate facts and disregarded federal Indian policy and the decisions of this Court concerning tribal sovereign immunity and the proscription against state infringement of tribal self-government. See pp. 35a-53a, infra.

As a practical and legal matter, the Decision of the Arizona Supreme Court will uniformly hale Indian tribes into state court to adjudicate the liability of their sureties thereby adjudicating the nature and extent of their own liability for reservation construction projects. 4/

4/ Smith's claim clearly arises from a reservation construction project: (1) the contract between the tribal housing authority and the tribe as general contractor; (2) the subcontract between the tribe and G,S&D Plumbing; (3) the surety bond; (4) the joint and direct check agreement between the tribe

(Footnote Continued)

ARGUMENT

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

Abject failure of the Arizona Supreme Court in this case of first impression to apply the infringement test articulated by this Court in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269 (1959), creates a pressing need for granting this Petition. 5/

(Footnote Continued)
and Smith; and (5) the construction of the Indian housing projects, were all executed and performed within the exterior boundaries of the Fort Apache Indian Reservation. See R.J. Williams v. Fort Belknap, 719 F.2d 979, 985 (9th Cir. 1983) [held location highly significant when reservation construction project concerned a specific physical thing; court applied RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 188 comment (e); 188(2); 189-191 (1971)]

5/ Rule 17, Supreme Court Rules, "Jurisdiction On Writ of Certiorari,":

> ".1. A review on writ of certiorari. . . will be granted only when there are special and important reasons therefor. . ."
>
> "(c) When a state court. . . has decided an important question of federal law which has not been, but should be, settled by this Court,
>
> (Footnote Continued)

Substantial construction by tribal contractors is ongoing throughout Indian country. Left in tact, the majority opinion compels that the liability of an Indian tribe's surety, and as a legal and practical matter, the liability of a tribe itself, will be determined in state court.

In Williams v. Lee, supra, a non-Indian operator of a general store on the Navajo Indian Reservation brought suit against Indians in state court to collect for goods purchased on credit. This Court held that:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence, would infringe on the rights of the Indians to govern themselves. 358 U.S. at 223, 79 S.Ct. at 272 (citations omitted)

Thus, the Williams test resolved jurisdictional conflicts by providing that a

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(Footnote Continued)
or has decided a federal question in a way in conflict with applicable decisions of this Court."

state's authority stops where tribal self-government would be affected. See Fort Mohave Tribe v. County of San Bernadino, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1678 (1977). 6/

Courts have consistently applied the Williams v. Lee "infringement test" to resolve conflicts between state court and tribal court jurisdiction. 7/

6/ As noted by this Court in Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269 (1959), the State of Arizona has not assumed civil jurisdiction over Indian tribes and their members as permitted under Pub.L. No. 83-280, §6, 67 Stat. 590, and therefore, has only limited power to determine matters to which a tribe is a party or in which it has an interest. See generally, F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, Ch. 6, §C(3a) at 362 (1982). Consequently, any state attempt to assert jurisdiction over a tribe or its interests must be closely scrutinized. United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985).

7/ See, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670 (1978); Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 1701 (1984) (off-reservation vendor of

(Footnote Continued)

The Ninth Circuit in R.J. Williams v. Fort Belknap Housing Authority, 719 F.2d 979, 983 (9th Cir. 1983) applied the Williams v. Lee infringement analysis and observed that the question of whether a particular assertion of state jurisdiction will infringe

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(Footnote Continued)
motor vehicles must comply with tribal court order to repossess on reservation); S. Unique v. Gila River Indian Community, 674 P.2d 1376 (Ariz.App. 1983) (off-reservation vendor of herbicide cannot sue in state court to collect debt); R.J. Williams Company v. Fort Belknap Housing Authority, 719 F.2d 979, 983 (9th Cir. 1983) (no state court jurisdiction over dispute arising from reservation construction project); Ramey Construction Company v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982) (federal court lacks jurisdiction over dispute arising from reservation construction project); A & A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) cert. denied, ___ U.S. ___ (1986) (tribal court proper forum to adjudicate dispute arising from reservation construction project); Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985); and Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1248 (1981) (tribes have sovereign power to exercise civil jurisdiction over non-Indians "who enter [into] consensual relationships with a tribe or its members through commercial dealing, contracts, leases or other arrangements.").

upon tribal self-government generally arises in one of two situations:

> First, if a state or federal court resolves a dispute which was within the province of the tribal courts or of other non-judicial law applying tribal institutions, that court would infringe upon the tribe's right to adjudicate controversies arising within it. Second, if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body, tribal self-government is drawn directly into the controversy. R.J. Williams Company v. Fort Belknap Housing Authority, supra, at 983 (citation omitted, emphasis applied). See also, Montana v. United States, 450 U.S. at 564-65, 101 S.Ct. at 1257-58. (Emphasis added)

There is no doubt that the dispute between Smith and petitioner Aetna is a dispute which involves or determines "an act fairly attributable to the tribe as a governmental body" because the ultimate party responsible for payment of the claims in this case is the tribe. State court adjudication of the nature and extent of the liability of the tribe's surety actually adjudicates the nature and extent of the tribe's liability.

Thus, by taking jurisdiction of the claim filed by Smith against Aetna, Arizona courts will effectively compel tribal agencies to litigate in state court all the issues which determine the nature and amount of the tribe's ultimate liability for the materialman's claim. It is impossible under these facts to avoid the conclusion that state assumption of jurisdiction infringes upon the tribe's right of self-government.

The majority opinion fails to discuss this point and simply characterizes the case as one "of a non-Indian materialman suing a non-Indian surety on a performance-payment bond". See p.33a. infra. 8/ As the dissenting

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8/ The Arizona Supreme Court's majority Opinion sidesteps the infringement test entirely by erroneously holding that tribal sovereign immunity is a personal rather than jurisdictional defense. It is well established that tribal sovereign immunity is jurisdictional in nature. See, e.g., National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. ___, 105 S. Ct. 2447, 85 L.Ed.2d 818 (1985: Chemehuevi Indian Tribe v. California State Board of

(Footnote Continued)

opinion aptly observes "actually, this is a case in which a non-Indian materialman is suing a non-Indian surety on a bond to obtain a judgment which the Indian tribe itself must ultimately pay." See pp. 46a-47a, infra. (Emphasis supplied by Justice Feldman).

Smith knowingly provided materials to be used by a subcontractor for installation in a tribal project in Indian country; [9/] and

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(Footnote Continued)
Equalization, 757 F.2d 1047, 1051 (9th Cir. 1985, citing Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 97 S.Ct. 2616 (1977); United States v. United States Fidelity and Guarantee Company, 309 U.S. 506, 512, 60 S.Ct. 653, 656 (1940); Northwest S.D. Production Credit Association v. Smith, 784 F.2d 323 (8th Cir. 1986), citing U.S. v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058 (1941) (Latter two cases involve sovereign immunity of the United States).

9/ The majority opinion makes much of the fact that the materialman was located off the reservation and sold the materials for installation into the reservation. Overwhelming authority precludes state court jurisdiction to collect in state court against a tribe for non-payment even when the vendor is located off the reservation. See, Babbitt Ford v. Navajo Tribe of Indians, 710 F.2d 587 (9th Cir. 1983); S. Unique v. Gila
(Footnote Continued)

therefore, Smith knew that he was entering into a commercial relationship with an Indian tribe and that the tribal court would have power to exercise civil authority over him. 10/ See, Merrion v. Jicarilla Apache Tribe,

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(Footnote Continued)
River Pima-Maricopa Indian Community, 674 P.2d 1376 (1983); Ramey Construction Company v. Apache Tribe of the Mescalero Reservation, 673 F.2d 315 (10th Cir. 1982), (non-Indian contractor sued tribe and its surety for breach of contract in federal court; held: barred by doctrine of sovereign immunity).

10/ The jurisdictional section of the tribal code, part of the record in this case, states in applicable part:

"Section 21.2 Acts submitting to Jurisdiction; Process:

> A. Any person, whether or not a member of the White Mountain Apache Tribe or resident of the Fort Apache Indian Reservation, who in person or through an agent commits any of the acts hereinafter enumerated, thereby submits such person, and, if an individual his personal representative, to the jurisdiction of the White Mountain Apache Tribe as to any cause of action arising from the doing of such acts:
>
> (1) the transaction of doing business within the reservation; . . .
>
> (4) contracting to insure any person,

(Footnote Continued)

455 U.S. 130, 144-45, 102 S.Ct. 894, 905-06 (1982); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985).

As the dissenting opinion aptly observes, Smith could have sued the subcontractor, G,S&D Plumbing, and still avoided jurisdiction in tribal court. Aetna does not contest the fact that a debt action on an open account brought by a non-Indian materialman against a non-Indian subcontractor properly belongs in the state court. However, Smith instead sued Aetna, the tribe's surety, in an action on the payment bond for a tribal project in Indian country.

(Footnote Continued)
property or risk located within the reservation at the time of contracting;

(5) contracting with a resident member of the White Mountain Apache Tribe or the White Mountain Apache Tribe for the sale or purchase of any goods or services knowing such contract is to be performed on or from within the Fort Apache Indian Reservation." (Emphasis added)

When Smith sued the tribe's surety, it directly and ultimately implicated the tribe as the ultimate source of the payment of the judgment which it sought in state court. 11/

CONCLUSION

The court's decision, if left unchanged, will render a nullity the federal policy establishing tribal sovereign immunity from suit in state court and most importantly, the proscription against state infringement of tribal self-government. This includes the right of Indian tribes to be judged civilly

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11/ This Court in National Farmers Union Insurance Company v. Crow Tribe of Indians, 471 U.S. __, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985), emphasized that the tribal court should decide in the first instance whether it has jurisdiction over an action arising on a reservation. In accord, Northwest S.D. Production Credit Association v. Smith, 784 F.2d 323 (8th Cir. 1986) at p. 326; A & A Concrete v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir. 1986) (non-tribal concrete subcontractor denied relief in federal district court against tribe arising out of concrete subcontract on reservation due to failure to exhaust tribal court remedies).

liable in their own courts.

Knowing full well that any direct suit against the tribe would be prohibited by the application of the infringement test established by this Court in Williams v. Lee, supra, Smith filed his action in state court naming only the tribe's surety, a stratagem condoned by the majority opinion issued by the Arizona Supreme Court.

For the foregoing reasons, this Petition for Certiorari should be granted. If the petitioner is correct in urging that the Arizona State Court has no jurisdiction to resolve Smith's claim against the tribe's surety, the matter should be remanded to the Arizona Supreme Court for appropriate disposition in the tribal court.

RESPECTFULLY SUBMITTED,

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APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

SMITH PLUMBING COMPANY, INC., an Arizona corporation, dba WHITE MOUNTAIN SUPPLY COMPANY, Plaintiff/Appellant,	F I L E D MAY 28, 1986
vs.	No. 17691-PR
AETNA CASUALTY & SURETY COMPANY, a Connecticut corporation, Defendant/Appellee,	Court of Appeals No. 2 CA-CIV 5072
WHITE MOUNTAIN APACHE TRIBE dba APACHE DEVELOPMENT ENTERPRISE, Defendant/Intervenor/Appellee	Gila County Superior Court No. 23,528

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

The Honorable Edward L. Dawson, Judge

REVERSED

Opinion of the Court of Appeals, Division Two
2 CA-CIV 5072, filed July 17, 1984
Approved as Supplemented

Killian, Legg, Nicholas & Fisher — Mesa
By: Charles W. Wirken
Attorneys for Plaintiff/Appellant

Robert C. Brauchli — Pinetop
Attorney for Defendants/Appellees

HOLOHAN, Chief Justice

This matter arises in this court on the petition by Aetna Casualty & Surety Co. and the White Mountain Apache Tribe doing business as Apache Development Enterprise to review a decision of the Court of Appeals. The appellate court had ruled that the superior court had jurisdiction over the claim by Smith Plumbing Co., Inc., an Arizona corporation, against Aetna, a surety on a performance bond for the White Mountain Apache Tribe's Enterprise. (Smith Plumbing Co., Inc. v. Aetna Casualty & Surety Co., 2 CA-CIV 5072, filed 7-17-84). We granted review to determine whether the exercise of jurisdiction by the superior court in this case violated the Tribe's right of sovereign immunity or interfered with the exclusive jurisdiction of the tribal court.

FACTS

The facts necessary to the decision of this case are not in dispute. In 1963 the Tribal Council of the White Mountain Apaches created the White Mountain Apache Housing Authority to

receive financial assistance from the United States Department of Housing and Urban Development (HUD) to build low income housing on the reservation. The Authority is an Indian corporation created by the Tribe and granted the necessary corporate powers to contract and to borrow money for the purpose of developing housing on the reservation. In its formation ordinance the Authority was also granted the power to waive immunity from suit for its obligations. [1] In 1968 the Tribe

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[1] HUD provided tribes with a form ordinance, which the White Mountain Apache Tribe adopted verbatim. 24 C.F.R. § 905, Appendix I. The tribal ordinance reads in pertinent part:

> The [tribal] Council hereby gives its irrevocable consent to allowing the Authority to sue and be sued in its corporate name, upon any contract, claim or obligation arising out of its activities under this ordinance and hereby authorizes the Authority to agree by contract to waive any immunity from suit which it might otherwise have; but the Tribe shall not be liable for the debts or obligations of the Authority.

(continued)

created the White Mountain Apache Development Enterprise to undertake construction projects on the reservation. The Enterprise is in realty a development enterprise of the White Mountain Apache Tribe. The Housing Authority contracted with the Enterprise in 1978 to build four low income housing projects financed with HUD funds. The Enterprise was to act as general contractor for the projects.

Pursuant to HUD regulations, the Enterprise, as general contractor, obtained a performance-payment bond for each construction contract from Aetna. The provisions of the bonds are on standard form documents prepared by HUD; they bind the Enterprise and its surety Aetna to the Authority, as owner of the projects, in the amount of the original

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[1] (continued)
White Mountain Apache Tribal Ordinance No. 47 (Jan. 16, 1963), amended Ordinance No. 102 Art. V(2) (Feb. 2, 1977). (emphasis added). Under this ordinance, thus, the Authority may, by contract, waive its sovereign immunity, but it may not obligate the Tribe to pay its debts.

contract sums. The bonds contain the standard conditions guaranteeing the payment of wages and materialmen on the projects.

The Enterprise entered into a subcontract with G,S&D Plumbing, a private business not connected with the Tribe, to supply all plumbing materials and labor for installation in the housing projects. Smith, a wholesale plumbing supplier in Lakeside, Arizona, outside the boundaries of the reservation, supplied G,S&D with plumbing supplies for the housing projects. Smith sold plumbing supplies to G,S&D on open account for a number of months, but Smith alleges that G,S&D stopped making payments on the account in June of 1980 leaving a balance owed of over $75,000. Smith claims the amount due is for material furnished to G,S&D for the housing project.

Smith initially filed suit in the United States District Court against G,S&D, the Enterprise and Aetna, but the federal court dismissed the action for lack of subject matter jurisdiction. Smith then filed a

complaint in the superior court against the Authority on the basis of unjust enrichment and against the Authority and Aetna on the performance-payment bonds.

Aetna and the Authority filed a motion to dismiss the complaint, which the trial court denied. The Enterprise thereafter moved to intervene in the action as an indispensable party pursuant to Ariz. R. Civ. P. 24, 16 A.R.S., asserting its status as the principal obligor on the bonds and its obligation to indemnify Aetna and the Authority for any judgment obtained against them. Smith did not oppose the Enterprise's motion, and the trial court granted it. Some months later, because Smith had never completed service of process upon the Authority, Smith filed a Notice of Dismissal as to the Authority only. Aetna and the Enterprise then filed a motion to dismiss, which the trial court granted, holding that it lacked jurisdiction over the Tribe and its agencies and that the surety could not be sued "directly."

Smith appealed the trial court's order dismissing the action against both Aetna and the Enterprise, but on appeal Smith sought relief only against Aetna. Concluding that Smith had waived any claim of error in the trial court's dismissal of the Enterprise, the Court of Appeals affirmed that portion of the trial court's order. The court reversed the dismissal of Aetna, ruling that the action could proceed against Aetna without joinder of the Enterprise.

APPEALS COURT DECISION

Although we granted review in this case to resolve issues concerning state and tribal jurisdiction, some additional comment on other issues decided by the Court of Appeals is appropriate.

Originally in the Court of Appeals Aetna contended that the bonds protected only the Authority, as owner, against the contractor's nonperformance and were not subject to action by an unpaid materialman. Citing this court's

decision in Webb Construction Company v. Crane Company, 52 Ariz. 299, 80 P.2d 698 (1938), the Court of Appeals held that Smith could maintain the action against Aetna. Construing the bonds as payment bonds in addition to performance bonds, the Court of Appeals held that a materialman was a beneficiary who could maintain a direct action against the surety without using the Tribe as a "conduit" to reach the surety. (Slip op. at 6-7.) In this court, Aetna and the Tribe do not contest the ruling that Smith may sue on the bonds in an appropriate court (Petition for Review, p.2).

Aetna argued that it is immune from action by Smith because it is entitled to assert its principal's sovereign immunity. The Court of Appeals rejected this argument, and we approve its ruling.

Generally, a surety may assert any defense available to its principal. Spear v. Industrial Comm'n., 114 Ariz. 601, 562 P.2d 1099 (App. 1977). One exception to this rule is where a principal takes advantage of a

personal defense. Personal defenses "are ordinarily of such a character that the principal, as he chooses, may insist upon them or not." 74 Am.Jur.2d Suretyship § 104 (1974). The Tribe may choose to waive its sovereign immunity. White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 7, 480 P.2d 654, 657 (1971). Because the Tribe has the power either to insist upon or to waive its sovereign immunity, that immunity is considered a personal defense not available to the Tribe's surety. See 74 Am.Jur.2d Suretyship § 109.

The sovereign immunity doctrine originates in social policy designed to protect the state "from burdensome interference with the performance of its governmental functions...." 72 Am.Jur.2d States, Territories, and Dependencies § 99 (1974). The compensated surety of a sovereign does not perform the governmental functions that require protection; therefore, the protections a government needs to conduct its functions do not extend to the

surety. Furthermore, to allow a compensated surety such as Aetna to assert it principal's sovereign immunity and so avoid payment on a bond would be to provide a windfall to the surety. Centraal Stikstof Verkoopkantoor, N.V v. Alabama State Docks Department, 415 F.2d 452, 458 (5th Cir. 1969). If Aetna were allowed this defense, it would receive valuable consideration in the form of compensation by the principal, without assuming the risk of payment in the event of its principal's default. Id.; see generally 74 Am.Jur.2d Suretyship §§ 256-59 (1974). The Court of Appeals refused to sanction such a result. It stated:

> Aetna must surely have been aware of the immunity of its principal from suit, and could have taken steps to protect itself, for example, by requiring the Enterprise and the Authority to identify all subcontractors and suppliers and to obtain releases from the latter prior to final payment. Having failed to do so, it cannot now escape its obligations under the bond under the guise of sovereign immunity.

(Slip op. at 17.) We agree.

Aetna also argued that the action of the plaintiff could not be maintained against the surety without joinder of the principal.

Ordinarily, the principal obligor on a surety bond must be joined in any action against the surety. Ariz. R. Civ. P. 17 (f), 16 A.R.S. The rule has an exception permitting actions against a surety without joinder of the principal obligor "when the latter resides beyond the limits of the state, or in such a part of the state that he cannot be reached by ordinary process of law...." Id. We agree with the Court of Appeals holding that the exception was intended to apply where the principal obligor was not subject to "jurisdiction for whatever reason, and is broad enough to encompass the Enterprise, which, although 'residing' within the state of Arizona, cannot be made subject to the court's jurisdiction because of its immunity from suit." (Slip op. at 14.)

Once the principal is shown to be within an exception to Ariz. R. Civ. P. 17 (f), the

plaintiff may proceed against the surety alone. First Nat'l Bank of Albuquerque v. The Standard Accident Insurance Co., 38 Ariz. 77, 81-82, 297 P. 864, 866 (1931). A creditor's neglect in failing to reach [sic] principal does not impair his right to pursue the surety. Kerby v. State, 62 Ariz. 294, 308-09, 157 P.2d 698, 705 (1945). The creditor may assert a right against the surety without having taken action against the principal. In re Yale Express System, Inc., 362 F.2d 111, 114 (2d Cir. 1966); ALI Restatement, Security § 82 (1941).

The Court of Appeals also rejected Aetna's contention that HUD regulations deprived state courts of jurisdiction in actions on the bond. (Slip Op. at 17.) We agree.

TRIBAL COURT JURISDICTION

Aetna and the Tribe assert that federal policy requires that the state courts should suspend their exercise of jurisdiction until the tribal court has determined its own

jurisdiction. This court has been referred to federal case authority which requires non-Indian litigants to exhaust tribal court remedies before seeking relief in federal court. For example, where non-Indian litigants ignored service of process and trial in tribal court on advice of counsel and then sought relief in federal court, the Circuit Court of Appeals upheld dismissal of the complaint; the plaintiffs had "failed to exhaust their remedies in tribal court," rendering federal review premature. A & A Concrete, Inc. v. White Mountain Apache Tribe, No. 85-2165, slip op. at 5, (9th Cir., filed Feb. 6, 1986). In A & A Concrete the Tribe had sued A & A in tribal court and had received a default judgment prior to A & A's suit in federal court.

Also, where an Indian plaintiff obtained a default judgment in tribal court against a non-Indian school district located within the confines of the reservation, the United States Supreme Court declared a federal

policy of deference to tribal courts in determining the existence and extent of their own jurisdiction. National Farmers Union Insurance Company v. Crow Tribe, 471 U.S. ___, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). The Supreme Court would have the existence and extent of tribal court jurisdiction examined

> in the first instance in the Tribal Court itself. Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge.

Id. at ___, 105 S.Ct. at 2454, 85 L.Ed.2d at 827. (footnotes omitted). In National Farmers, the Supreme Court did not deny that the federal district court had jurisdiction; it merely required the district court to withhold jurisdiction until the tribal court had had the opportunity to rule upon the question of jurisdiction. Id. at ___, 105 S.Ct. at 2454, 85 L.Ed.2d at 828.

In both National Farmers and A & A Concrete the tribal courts had exercised jurisdiction and rendered judgment prior to initiation of the federal suits. The federal courts have also declined to exercise jurisdiction when non-Indian plaintiffs sought to challenge tribal exercise of governmental power over them. Hardin v. White Mountain Apache Tribe, Nos. 84-1912 and 84-2164 (9th Cir., filed Dec. 27, 1985) (Tribe could legitimately exclude non-Indian convicted felon from reservation to preserve safety of residents); Snow v. Quinault Indian Nation, 709 F.2d 1319 (9th Cir. 1983) (challenge to tribal taxation of businesses on reservation a legitimate matter of self-government and sovereign power best adjudged by tribal court).

The Ninth Circuit stated in A & A Concrete that "[t]he Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and

non-Indians which are based upon events occurring on the reservation." Slip op. at 7-8 (citations omitted). In National Farmers, A & A Concrete, and Hardin, the tribal court had initially exercised jurisdiction over tribe [sic] member plaintiffs and non-Indian defendants. Because the tribal courts had already assumed jurisdiction, the federal courts declined in these cases to interfere with the determination by tribal courts of the extent of their jurisdiction.

The cases Aetna cites for the proposition that the state courts must suspend jurisdiction in deference to tribal court jurisdictional determination all share a common element: an Indian plaintiff who instituted an action in tribal court.

In the case at bench, none of the parties has initiated proceedings in tribal court. There has been no assertion of tribal jurisdiction. It is not a question of initial assumption of jurisdiction by a tribal court. By hearing the merits of this

case, the courts of Arizona will not be usurping legitimate exercise of asserted tribal court jurisdiction. Thus, there is no need for comity or deference to the tribal court process.

The real question thus becomes, does this plaintiff have to file his suit in tribal court? We think not.

Tribal court is not always the appropriate forum for adjudicating occurrences on tribal land. For example, a tribal court does not have criminal jurisdiction to try and to punish non-Indians for offenses committed on the reservation. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed. 2d 209 (1978).

On the other hand, tribal courts have jurisdiction in cases involving disputes between Indian and non-Indian parties arising from commercial activity occurring exclusively on the reservation. Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). The presence of one of two factors renders

exercise of state court jurisdiction over disputes involving Indian parties invalid: First, "state action infring[ing] on the right of reservation Indians to make their own laws and be ruled by them," Id., 358 U.S. at 220, 79 S.Ct. at 271, 3 L.Ed.2d at 254; second, federal pre-emption of state authority. Ramah Navajo School Board, Inc. v. Bureau of Revenue, 458 U.S. 832, 102 S.Ct. 3394, 73 L.Ed.2d 1174 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980). Even on the reservation, state laws may be applied unless it would interfere with tribal self-government or would damage a right under federal law. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed.2d 115, 119 (1973).

In White Mountain Apache Tribe v. Bracker, supra, the court suggests a balancing between federal interest in encouraging tribal self-government and state regulatory interest. Although a pre-emption analysis

begins with whether specific congressional acts govern a given state action, it ultimately amounts to whether Indian self-government is implicated.

Aetna maintains that the adjudication of this case in a state court will have an impact on the White Mountain Apache tribal treasury. even if such an impact does occur, does state court jurisdiction in this case frustrate federal policy or violate traditional notions of tribal sovereignty?

Both White Mountain Apache Tribe v. Bracker, supra, and Williams v. Lee, supra, involved intrusions onto the reservations by the State. In Bracker, the Arizona Highway department and the Arizona Highway Commission sought to impose the state's motor carrier tax and excise fuel tax on a non-Indian logging contractor hired by the Tribe for on-reservation logging activities. Because of comprehensive federal regulation of all aspects of Indian timber harvesting, the Court found the additional taxation

burdensome, and without justification in terms of state regulatory or service interest. Arizona had "no duties or responsibilities respecting the reservation Indians," and therefore it frustrated federal policy by reaching onto the reservation to tax even non-Indian participants in on-reservation activities, creating tax impact on the tribe. Bracker, 448 U.S. at 152, 100 S.Ct. at 2588, 65 L.Ed.2d at 678.

Williams v. Lee likewise involved the state reaching onto the reservation. A non-Indian trading post proprietor sued a reservation Indian in state court for a debt allegedly owed him from sales at his store located on the reservation. A reservation Indian could not reasonably expect to be haled into Arizona state court because of transactions occurring wholly on the reservation; the tribe therefore had a powerful interest in adjudicating the disputes between reservation Indians and non-Indians doing business on Indian land. In comparison, the

State had relatively weak interest where non-Indians had interjected themselves into reservation affairs. Accord, Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983) (tribal court has jurisdiction over repossession on reservation of motor vehicles purchased off reservation by tribe members).

White Mountain Apache Tribe v. Bracker and Williams v. Lee involved non-Indian regulatory or commercial and judicial intrusion into Indian territory. As the activity in question moves off the reservation the State's governmental and regulatory interest increases dramatically, and federal protectiveness of Indian sovereignty lessens. Organized Village of Kake v. Egan, 369 U.S. 60, 75, 82 S.Ct. 562, 571, 7 L.Ed.2d 573 (1962). For example, in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed. 2d 96 (1976), an Indian smoke shop proprietor sold cigarettes to both Indians and non-Indians in an area of interspersed reservation and non-reservation

land. While taxation of cigarettes sold to Indian patrons of the reservation store was impermissible,

> [t]he State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax. ...We see nothing in this burden which frustrates tribal self-government [citing Williams v. Lee], or runs afoul of any congressional enactment dealing with the affairs of reservation Indians. [citation omitted]...[T]o the extent that the "smoke shops" sell to those upon whom the State has validly imposed a sales or excise tax with respect to the articles sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof.

Id. at 483, 96 S.Ct. at 1646, 48 L.Ed.2d at 112 (emphasis added). But see McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (Arizona has no jurisdiction to tax income of Navajo tribe members resident on [sic] reservation where income derived wholly from reservation sources).

Where state action benefits Indians, a different result occurs. The Ninth Circuit has held that states may apply their workers' compensation laws to all federal territory within state boundaries. Begay v. Kerr-McGee Corporation, 682 F.2d 1311, 1319 (9th Cir. 1982) (construsing [sic] 40 U.S.C. §290). Claims by Indians against their non-Indian employers "and the exercise of state jurisdiction over such claims does not, even minimally, infringe upon or frustrate tribal self-government." Id. (citations omitted)

The United State [sic] Supreme Court has held that while New Mexico could not impose a use tax on personalty attached by a tribe to off-reservation federal land it leased, the state could legitimately impose a nondiscriminatory gross receipts tax on the ski resort the tribe operated there. Mescelaro Apache Tribe, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973). "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been

held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." Id. at 148-49, 93 S.Ct. at 1270, 36 L.Ed.2d at 119.

In the present case, the Tribe has reached outside the bounds of the reservation to purchase supplies for its federally-sanctioned and -funded housing project. Unlike the contractors in A&A Concrete, supra, and R.J. Williams Co. v. Fort Belknap Housing Auth., 719 F.2d 979 (9th Cir. 1983), Smith engaged in no on-reservation installation. Smith did not conduct his business on the reservation. Under the rationale of Moe, Begay, and Mescalero Apache, supra, the Tribe's reaching out outside the confines of the reservation to engage in commercial activity -- without the concomitant reaching in by non-Indians -- make this a proper instance of nondiscriminatory adjudication of a contract claim by the courts of this state.

FEDERAL POLICY

The courts of this state may not, nor do they desire to, exercise authority over an Indian tribe. Both the Enabling Act (36 U.S. Stat 567) and the Arizona Constitution (Ariz. Const. art 20 § 4) clearly forbid such assertion of jurisdiction. Aetna, however, contends that an action against it is in effect an indirect action against the Tribe, with the impermissible effect of allowing the successful party to reach tribal resources. See generally White Mountain Apache Tribe v. Shelley, supra; Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968). This contention ignores the nature of Aetna's suretyship with the Enterprise in this situation, and its origin in deliberate federal policies.

Congress has repeatedly acknowledged the obstacles Indians face in achieving economic development and self-sufficiency. For example, the United States House of Representatives Report on legislative history for the

Indian Financing Act of 1974 (Public Law No. 93-262) declares,

> [t]he credit and capital resources necessary for Indian development of their own resources and Indian-owned and operated small business is nowhere near adequate. Lacking their own capital, they must rely on the private money markets. Yet, these resources are practically closed to them. Indian tribes and individuals have been categorized as poor credit risks in the private market for reasons often beyond their control. As a consequence, private credit, if available at all, is only available at interest rates so high as to be prohibitive.

1974 U.S. Code Cong. & Ad. News 1874. As part of Congress' efforts to aid in Indian development, it has authorized HUD to disburse funds to Indian housing authorities for lower income housing projects. 24 C.F.R. § 905 (1985). When funding lower income housing construction projects, HUD promotes Indian businesses by requiring Indian Housing Authorities to favor the hiring of Indian-owned commercial enterprises or tribal organizations. 24 C.F.R. § 905.106 (1985). For the housing projects in this case, the

Authority did contract with an Indian-owned commercial venture, the Enterprise.

The HUD regulations concerning lower income Indian housing also include certain protections for Indian Housing Authorities which commission the construction of housing projects. For instance, the production method the Authority chose here dictated under HUD regulations that the "contractor shall be required to provide assurance in the form of 100 percent performance and payment bonds, or a lesser percentage or other security approved by HUD." 24 C.F.R. § 905.203 (c) (1905), (emphasis added). [2] The

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[2] The "Conventional Method" of housing production requires a 100 percent performance-payment bond of the contractor, while the "Turnkey" and "Modified Turnkey" methods permit the Authority to require such a bond. Alternatively, the Authority itself may act as contractor. 24 C.F.R. § 905.203 (1985).

A 1979 revision of Indian housing regulations altered only insignificantly the suretyship requirement under former 24 C.F.R. § 805.203(c) (1985), "assurance in the form of 100 percent performance and payment bonds,

(continued)

suretyship requirement thus protects the housing authority by assuring completion of the project. It also protects the sub-contractors and suppliers.

While they recognize the need for Indian business development, Congress and HUD are also well aware of the doctrine of tribal immunity. For example, in HUD's regulations promulgating Indian Housing Authorities, it provides tribes with a form tribal ordinance which includes a "sue and be sued" provision. 24 C.F.R. § 905, Appendix I Art. V(2); White Mountain Apache Tribal Ordinance No. 47 (Jan. 16, 1963), amended Ordinance No. 102 (Feb. 2,

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[2] (continued)
or other security approved by HUD, such as a letter of credit or escrow." 41 Fed. Reg. 10,160 (1976). HUD has explained its requirement of 100 percent performance and payment bonds for conventional method project development by non-Indian Public Housing Authorities, as designed "to protect the Federal interest." 24 C.F.R. § 941.102(a) (1985); 45 Fed. Reg. 60,837 (1980). Public Housing Authorities are state, county, municipal or other governmental or public bodies authorized to develop and operate law-income housing. 24 C.F.R. § 941.103 (1985).

1977). [3] This explicit waiver of sovereign immunity facilitates Housing Authorities interaction with non-Indian creditors and suppliers; as a rule, businesses hesitate to sell goods and to extend credit when they know they lack legal recourse should contracts be breached. Tribal immunity generally causes businesses that deal with the tribes to "do so at great financial risk." S. Unique v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 386, 674 P.2d 1376, 1384 (App. 1983).

HUD requires bonding or alternative assurance of all contractors building Indian housing projects and Public Housing Authority projects. The suretyship requirement is not an authorization to waive sovereign immunity like the "sue and be sued" provision the

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[3] The Authority, however, cannot obligate the Tribe for its own debts. In this case, the White Mountain Apache Housing Authority is not a party.

Tribe enacted in creating the Authority. [4] The Enterprise, as an Indian tribal agency, remains immune from suit without Congressional or tribal consent. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894, 899 (1940); White Mountain Apache Indian Tribe v. Shelley, supra. HUD nevertheless recognized that both Indian and non-Indian parties to housing construction contracts would engage in those contracts more readily with the protection of performance-payment bonds assuring both project completion and payment of subcontractors and materialmen.

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[4] "Although charities and municipalities may waive their immunity from suit by purchasing liability insurance and be subject to damages to the extent of the insurance coverage, the purchase of insurance has not been held to waive tribal immunity." Note, In Defense of Tribal Sovereign Immunity, 95 HARV. L. REV. 1058, 1073 (1982); Atkinson v. Haldane, 569 P.2d 151, 169 (Alaska 1977) (waiver "should [not] be implied from an act which was intended to protect tribal resources"); Graves v. White Mountain Apache Tribe, 117, Ariz. 32, 570 P.2d 803 (App.

(continued)

In light of the policy goals set by Congress for Indian economic development and for encouraging construction of lower income housing under 42 U.S.C. § 1437, we conclude that HUD intended to encourage non-Indian building subcontractors and suppliers to do business with Indians by providing bonding protection on federally-financed housing projects. Otherwise, there would be no reason to have performance and payment bonds.

Further, there is nothing in the complex and detailed regulations by HUD on this subject of Indian housing which suggests that subcontractors or suppliers are limited to any specific court to enforce their claims against the bond. On the contrary, "the sue and be sued" regulations for Indian Housing Authorities suggest that it is federal policy that those, who in good faith, supply goods or services to such project should have the

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[4] (continued)
1977), cert. denied, 436 U.S. 931 98, S.Ct. 2831, 56 L.Ed.2d 776 (1978).

same protection and rights as similar persons dealing in the private sector.

The White Mountain Housing Authority is, of course, no longer a party in this action. The general contractor is the Enterprise, an agency of the tribe; nevertheless, that agency was required to furnish a surety bond for the protection of subcontractors and suppliers of materials for the project the same as that required of any private contractor. We find no federal policy which requires actions on such bonds to be brought in tribal or federal court. We believe that federal policy allows the materialman to bring an action on the bond in state court against the surety. As long as the state court does not attempt to assert jurisdiction over the Tribe, there is no violation of the policy against state infringement upon tribal self-government. It is certainly possible, if Smith recovers on the bond, that at some future date Aetna may be able to enforce its

indemnity agreement with the Tribe; [5] If the Tribe or the Enterprise has agreed to waive its immunity to suit by Aetna for amounts paid to Smith, that agreement is a matter beyond the consideration of this court. The case before this court is one of a non-Indian mat rialman suing a non-Indian surety on a performance-payment bond, on which the materialman is an intended beneficiary. We conclude that the action by the plaintiff does not violate federal policy or infringe upon tribal self-government. The decision of the Court of Appeals is approved as supplemented by this opinion, and the judgment of the superior court dismissing the action against the surety is reversed with directions to reinstate the complaint. The

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5 White Mountain Apache Tribe Civil Code § 21.1 Jurisdiction

The Tribal Court of the White Mountain Apache Tribe shall have jurisdiction over all civil suits wherein an Indian or a member of the White Mountain Apache Tribe or the White Mountain Apache Tribe is a party...

dismissal of the action against the Enterprise is affirmed.

WILLIAM A. HOLOHAN, Chief Justice

CONCURRING:

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

FELDMAN, Justice, dissenting

I dissent.

The majority today in effect holds that the liability of an Indian tribe to a creditor of its subcontractor may be determined in state court. The opinion holds that the result "will not be usurping legitimate exercise" of tribal court jurisdiction and does not "interfere with tribal self-government." Slip op. at 9, 10. The court reaches this remarkable conclusion by engaging in a magic shadow show which misconstrues the ultimate facts and barely mentions the real issue. The case boils down to a single, simple principle: where both a state and a tribe have an interest in adjudicating a civil matter, strong federal policy in favor of tribal self-government requires the tribal court to determine in the first instance whether it has jurisdiction. National Farmers Union Insurance Co. v. Crow Tribe of Indians, ___ U.S. ___, ___, 105 S. Ct. 2447, 2454 (1985).

THE FACTS

The majority tells us that this is not a

case where non-Indians have "interjected themselves into reservation affairs." Slip op. at 11. It is, the majority says, a case of "the Tribe reaching out outside the confines of the reservation to engage in commercial activity - without the concomitant reaching in of non-Indians." Slip op. at 13. The court has incorrectly characterized the ultimate facts. They are, simply, that a tribal authority, as owner, engaged a tribal enterprise to act as prime contractor for the construction of an Indian housing project in Indian county for Indian use.[1] Plaintiff

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[1] The Enterprise which entered into the contract with the non-Indian subcontractor, GS&D Plumbing, is not a distinct entity, but is rather part of the governmental organization of the Tribe. Cf. White Mountain Apache Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654 (1971); S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community, 138 Ariz. 378, 674 P.2d 1376 (App. 1983). Its assets are tribal resources and cannot be reached by suit in state court. Shelley, supra; S. Unique, supra; Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 401 (1968).

knowingly sold plumbing fixtures to a subcontractor obligated to install them in an Indian project in Indian country. Plaintiff chose to participate in an undertaking involving Indians and an Indian tribe. Plaintiff's conduct arguably indicates quite clearly that it knew what this court professes not to know - that ultimate security for payment for material supplied consisted of a job payment bond on which the principal obligor was the Enterprise, a tribal agency.

The majority pretends that the sale of the fixtures from plaintiff to the subcontractor was a simple transaction on open account between non-Indians. (Slip op. at 13.) Not so. Evidencing plaintiff's knowledge that its plumbing fixtures were to be installed in an Indian project in Indian country are the facts that plaintiff signed lien waivers and entered into both a "Joint Check Agreement" and a "Direct Check Agreement" between it, the subcontractor and the Indian General Contractor, White Mountain

Apache Development Enterprise, a tribal agency. Also, in its answers to interrogatories it claimed to have a contract with the Enterprise. While most, if not all, of the fixtures not paid for were sold before execution of these documents, certainly the documents provide some evidence that the plaintiff was aware of the circumstances.

Further, it is safe to assume that a firm which describes itself as a vendor of "wholesale plumbing fixtures" in Pinetop-Lakeside, a metropolis of 2,335 people on the edge of the reservation, would have known very well the destination for $300,000 worth of fixtures. Certainly, the sale of 300 sinks and toilet bowls is an unusual event in a such a town. Nevertheless, lacking evidence, the majority prefers to assume that this was a simple transaction between non-Indians, unaware of any connection with Indian affairs. (Slip op. at 13.) The majority's statement that "Smith did not conduct business on the reservation"

is gross speculation. The record does not indicate where the sale was made or whether delivery was made to the reservation. The record indicates very little, since the case was decided on [sic] motion to dismiss. It does show, however, that a majority of plaintiff's invoices were submitted directly to the tribal agency and paid directly by it.

Plaintiff chose not to sue the non-Indian subcontractor for those invoices not paid, and, instead, brought the action against the Tribe's surety and indemnitee. Thus, the Tribe did not "reach out"; this is a case of "reaching in". Cf. R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 985 (9th Cir. 1983) (fact that contract involved housing to be built on the reservation, to be occupied by reservation members and paid for by an agency representing the Tribe established the reservation as the locus of the contract dispute), cert. denied, ___ U.S. ___, 105 S.Ct. 3476 (1985).

THE ISSUE

In its lengthy opinion, in which various legal principles appear and disappear like the proverbial pea, the majority only touches upon the real issue when it states that "a preemption analysis ... ultimately amounts to whether Indian self-government is implicated." Slip op. at 10. That, in fact, is all that this case is about. If the majority had applied such a preemption analysis it would have reached the correct result.

Although their sovereignty is not absolute, Indian tribes remain a separate people with the power to make and enforce in their own courts substantive law regulating matters which concern the tribe and occur within its geographical territory. See Williams v. Lee, 358 U.S. 217, 223, 79 S.Ct. 269, 272 (1959); R.J. Williams Co. v. Fort Belknap Housing Authority, supra. Tribes have sovereign power to exercise civil jurisdiction over non-Indians "who enter [into] consensual relationships with the

tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981). Tribal courts are the "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65, 98 S.Ct. 1670, 1681 (1978).

Having failed to assume civil jurisdiction over Indian tribes and their members as permitted under Pub. L. 83-280, § 6, 67 Stat. 590, Arizona has only limited power to determine matters to which a tribe is a party or in which it has an interest. See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW, ch. 6, § C(3)(a) at 362 (1982 ed.); Williams v. Lee, supra. Any state attempt to assert jurisdiction over a tribe or its interests must be closely scrutinized. See United States v. Superior Court, 144 Ariz. 265, 697 P.2d 658 (1985).

The test for determining whether the state may exercise its jurisdiction in Indian matters was articulated by the United States Supreme Court in Williams v. Lee, supra. In that case, a non-Indian operator of a general store on the Navajo Indian Reservation brought suit against Indians in State Court to collect for goods sold on credit. The Supreme Court held that

> [t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that [the general store operator] is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. ... If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223, 79 S.Ct. at 272 (citations omitted, emphasis supplied). Thus, the Williams test resolves jurisdictional conflicts by providing that a state's authority stops where tribal self-government would be

affected. See Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253, 1256 (9th Cir. 1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1678 (1977).

Courts have consistently applied the Williams v. Lee "infringement" test to resolve conflicts between state court and tribal court jurisdiction. See, e.g., United States v. Superior Court, supra; Santa Clara Pueblo v. Martinez, supra; R.J. Williams Co. v. Fort Belknap Housing Authority, supra; Babbitt Ford v. Navajo Indian Tribe, 710 F.2d 587 (9th Cir. 1983). In considering a matter similar to the one before this court, the Ninth Circuit Court of Appeals observed that the question of whether a particular assertion of state jurisdiction will infringe upon tribal self-government generally arises in one of two situations:

> First, if a state or federal court resolves a dispute which was within the province of the tribal courts or of other nonjudicial law-applying tribal institutions, that court would impinge upon the tribe's right to adjudicate controversies arising within it. Second,

> if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body, tribal self-government is drawn directly into the controversy.

R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d at 983 (citations omitted; emphasis supplied); see also Montana v. United States, 450 U.S. at 564-65, 101 S.Ct. at 1257-58. Thus, the question here is whether the dispute between Smith and Aetna is a dispute which involves or determines "an act fairly attributable to the tribe as a governmental body."

THE TRIBE'S INVOLVEMENT

If Smith obtains a judgment against Aetna, the surety, the latter has a claim for indemnification and reimbursement against the Enterprise. The right of indemnification presumably comes from an indemnification agreement between the Tribe and Aetna. That agreement is not part of this record, although it is referred to. I do not speculate as to its contents. Even if there were no agreement, hornbook law gives a surety a

right of reimbursement against the principal obligor. Restatement of Security § 104 (1941). In other words, judgment against Aetna will provide Aetna with a claim for reimbursement from the Enterprise, which is part of the Tribe and supported by the tribal treasury.

In addition, adverse resolution in state court of whatever defenses exist to Smith's claim will be res judicata against Aetna and will collaterally estop the Enterprise as principal obligor. This is because a principal obligor is ordinarily bound by judgment rendered against the surety, and collaterally estopped from raising defenses which have been asserted by and determined against the surety. See A. STEARNS, THE LAW OF SURETYSHIP § 11.43 at 525-26 (5th ed. 1973); Farmers Insurance Company of Arizona v. Vagnozzi, 138 Ariz. 443, 446, 675 P.2d 703, 706 (1983); United States Fidelity & Guaranty Company v. Alfalfa Seed & Lumber Company, 38 Ariz. 70, 73, 297 P. 868, 869 (1931).

Because the ultimate party responsible for payment of the claims in this case is the Tribe, state court adjudication of the nature and extent of the liability of the Tribe's surety actually adjudicates the nature and extent of the Tribe's liability. Thus, by taking jurisdiction of the claim filed by Smith against Aetna, our courts will effectively compel tribal agencies to litigate in state court all issues which determine the nature and amount of the Tribe's ultimate liability for the materialman's claim. It is impossible, therefore, to avoid the conclusion that state assumption of jurisdiction infringed upon the Tribe's right of self-government. Having failed even to discuss this point, the majority ends its sentence too soon when it characterizes this as a case "of a non-Indian materialman suing a non-Indian surety on a performance-payment bond." Slip op. at 18. Actually, this is a case in which a non-Indian materialman is suing a non-Indian surety on a bond to obtain

a judgment which the Indian tribe itself must ultimately pay.

PLAINTIFF'S CONSENSUAL INVOLVEMENT WITH THE TRIBE

By providing materials to be used by a subcontractor for installation in a tribal project in Indian country, Smith should have been well aware that he was entering into a commercial relationship on a tribal project so that tribal courts would have power to exercise civil authority over it. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45, 102 S.Ct. 894, 905-06 (1982); Hardin v. White Mountain Apache Tribe, 779 F.2d 476, 479 (9th Cir. 1985). Nevertheless, Smith could still have avoided jurisdiction in tribal court. It could have sued the subcontractor; certainly, a debt action on open account, brought by a non-Indian materialman against a non-Indian subcontractor, properly belongs in state court. However, Smith instead sued Aetna, the Tribe's surety, in an action on the payment

bond for a tribal project in Indian country. Even if that action was the result of pragmatic necessity, the result is the same. When Smith sued the Tribe's surety, it directly and ultimately implicated the Tribe as the ultimate source of the payment of the judgment which it sought in state court. A & A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411 (9th Cir., 1986), Petition for cert. filed (54 U.S.L.W. 3664) (No. 85-1598).

Because the action concludes tribal defenses and because the ultimate source of payment of any judgment which Smith may get against Aetna is the Tribe, the latter's right of self-government is implicated and the action should be brought in tribal court, if it has jurisdiction to hear and adjudicate such an action. Any lack of jurisdiction would not result from state or federal law, since the "Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting

the interests of Indians and non-Indians which are based upon events occurring on the reservation." Id. at 1415. There might be some lack of jurisdiction because of provisions in the laws of the Tribe, but we have been instructed that the existence and extent of tribal court jurisdiction is "an examination which should be conducted in the first instance in the Tribal Court itself." Id. (quoting National Farmers Union Insurance Co. v. Crow Tribe of Indians, supra). Interpretation of the tribal code is one of the responsibilities of the tribal court, Fort Belknap, 719 F.2d at 983, and any attempt by any other court to determine the jurisdictional question for the Tribe would severely infringe upon the Tribe's "right to adjudicate controversies" arising on the reservation. See id.; National Farmers Union Insurance Co., supra.

DEFERENCE; SUSPENSION OF STATE PROCEEDINGS

The majority argues that adjudication in state court may not affect the Tribe since it

may assert its right of sovereign immunity when and if Aetna attempts to obtain indemnification or reimbursement by action against the Tribe. Slip op. at 18. This argument is only partly right. If the Tribe does not assert the claim of sovereign immunity, then it will have been compelled by application of the doctrine of collateral estoppel to submit to the adjudication of the nature and amount of Smith's claim and all defenses thereto in state court, when it had a right to have those issues determined in tribal court. If it wishes to avoid that, it will be forced to assert the defense of sovereign immunity to the claim of its surety, thus adversely affecting its ability to do business and make such contracts in the future.

Of course, it is always possible that the Tribe may eventually assert its sovereign immunity [2] as a defense or that the tribal

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[2]The majority assumes that the Enterprise did
(continued)

courts will decline jurisdiction of the case. Neither of these possibilities militates against deferring to the preemptive jurisdiction of the tribal court. Although, as noted ante at 8, examination of tribal jurisdiction should occur first in tribal court, there is no need to dismiss the state action. It may simply be held in abeyance until it is determined that the tribal court has jurisdiction and that the Tribe has waived the defense of sovereign immunity. Cf. National Farmers Union Insurance Co., supra. If the Tribe does assert the defense at any time, then the action truly becomes one in which the tribal interests are not involved and may be allowed to proceed in state court.

PROTECTION OF MATERIALMEN

The majority argues that by requiring a surety for the Tribe's construction

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[2] (continued)
not waive sovereign immunity in the indemnification agreement. I will indulge this assumption.

obligations, Congress intended to protect materialmen such as Smith. Slip op. at 17. This is true but becomes relevant only by the majority's implicit assumption that non-Indian materialmen will be less protected in tribal court than in state court. This attitude is not supported by law or policy. Congress' decision to require a payment bond is no more than a conclusion that payment bonds were necessary to protect materialmen against the tribes' sovereign immunity from suit. It does not create an implicit exception to the longstanding congressional and judicial policy favoring tribal jurisdiction by authorizing materialmen to establish tribal liability in state courts. Although the majority evidently fears that non-Indians may be treated unfairly in tribal court, it articulates no grounds for its apprehension. No doubt, in the distant past some Indians may have been treated unfairly in state court. The majority opinion is a throwback to those times.

STANLEY G. FELDMAN, Justice

I concur in Justice Feldman's dissent.

FRANK X. GORDON, JR., Vice Chief Justice

APPENDIX B.

SUPREME COURT

STATE OF ARIZONA

201 West Wing, State Capitol
1700 West Washington
Phoenix, Arizona 85007-2866

F I L E D

JULY 18, 1986

July 18, 1986

RE: SMITH PLUMBING COMPANY vs. AETNA CASUALTY & SURETY COMPANY
Supreme Court No. 17691
Court of Appeals No. 2 CA-CIV 5072
Gila County No. 23, 528

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on July 15, 1986, in regard to the above-referenced cause:

"ORDERED: Statement of Costs approved in the sum of $15 as and for costs.

"FURTHER ORDERED: Motion for Reconsideration = DENIED.

"Justices Gordon and Feldman voting to grant."

Mandate enclosed.

DAVID R. COLE, Clerk

TO:

Robert C. Brauchli, Esq.
Charles W. Wirken, Esq.,
Killian, Legg, Nicholas & Fischer

pr

APPENDIX C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SMITH PLUMBING COMPANY, INC., an Arizona corporation, dba WHITE MOUNTAIN SUPPLY COMPANY, Plaintiff/Appellant, vs. AETNA CASUALTY & SURETY COMPANY, a Connecticut corporation, Defendant/Appellee, WHITE MOUNTAIN APACHE TRIBE, dba APACHE DEVELOPMENT ENTERPRISE, Defendant/Intervenor/Appellee.	F I L E D JULY 17, 1984 No. 2 CA-CIV 5072 O P I N I O N

Appeal from the Superior Court of Gila County

Cause No. CV 23,528

The Honorable Edward L. Dawson, Judge

AFFIRMED IN PART
REVERSED AND REMANDED IN PART

KILLIAN, LEGG, NICHOLAS & FISCHER
By Charles W. Wirken Mesa

Attorneys for Plaintiff/Appellant

Robert C. Brauchli Whiteriver

Attorney for Defendant/Appellee and
Defendant/Intervenor/Appellee

B I R D S A L L, Chief Judge.

This appeal was taken from the order of the superior court dismissing appellant's complaint. A brief recitation of the facts underlying the action follows.

In 1963, the Tribal Council of the White Mountain Apache Tribe (Tribe) created the White Mountain Apache Housing Authority (Authority) for the purpose of receiving financial assistance from the federal government for the construction of low income housing. In 1968, the Tribe created the White Mountain Apache Development Enterprise (Enterprise) for the purpose of undertaking construction projects on the reservation. In 1978, the Authority contracted with the Enterprise for the construction of four low-income housing projects to be financed with funding received from the United States Department of the Housing and Urban Development (HUD).

Pursuant to HUD regulations, the Enterprise obtained four performance-payment bonds pertaining to each construction contract from

appellee Aetna Casualty & Surety Company (Aetna). Under the terms of these bonds, which are standard form documents prepared by HUD for such projects, the Enterprise as principal and Aetna as surety jointly and severally bound themselves to the Authority, as owner of the projects, in the amount of the individual contract sums, provided that:

> . . . if the Principal shall well, truly and faithfully perform its duties, all the undertakings, covenants, terms, conditions, and agreements of said contract . . . and if he shall satisfy all claims and demands incurred under such contract, . . . and shall promptly make payment to all persons, firms, subcontractors, and corporations furnishing materials for or performing labor in the prosecution of the work provided for in such contract, and any authorized extension or modification thereof, including all amounts due for materials, lubricants, oil, gasoline, coal and coke, repairs on machinery, equipment and tools, consumed or used in connection with the construction of such work, and all insurance premiums on said work, and for all labor, performed in such work whether by subcontractor or otherwise, then this obligation shall be void; otherwise to remain in full force and effect.

* * *

> PROVIDED, FURTHER, that no final settlement between the Owner and the Contractor shall abridge the right of any beneficiary hereunder, whose claim may be unsatisfied. (Emphasis supplied)

The Enterprise entered into a subcontract with G,S&D Plumbing, apparently a non-Indian business, to supply all plumbing materials and labor for the installation of the plumbing for the housing projects. The appellant, an Arizona corporation, supplied G,S&D outside the reservation with plumbing supplies for the projects but apparently was never fully paid for the materials by G,S&D. The present action was filed in the Gila County Superior Court, naming the Authority and Aetna as defendants. 1/ The complaint sought relief against the Authority on a theory of unjust enrichment, and against the Authority and Aetna through the performance-payment bonds.

1/ A prior action against G,S&D, the Enterprise and Aetna filed in the United States District Court for the District of Arizona was dismissed for lack of subject matter jurisdiction.

Aetna and the Authority filed a motion to dismiss the complaint, which was joined in by the Tribe ". . . which has not been named in this lawsuit; but who is an indispensable party to the lawsuit if relief is to be obtained against the named defendants . . . without submitting to the jurisdiction of this Court . . ." The basis for the motion was the parties' contention that the Tribe was an indispensable party to the lawsuit, that the Tribe was immune from suit, that this immunity inured to the benefit of Aetna and the Authority, and that the tribal court had exclusive jurisdiction over the cause of action. In denying the motion, by order dated March 14, 1982, the court ruled as follows:

> The Court finds that the White Mountain Apache Tribe is a dependent sovereignty and not subject to jurisdiction of the Arizona Superior Courts; the Court also finds that the White Mountain Apache Housing Authority is a subordinate economic organization of the Tribe; and the Court further finds that there is a legitimate question of fact as to whether the waiver of indemnity [sic] signed by the Housing Authority subjects it to the jurisdiction [sic] of the State Court and thereby

> subjects AETNA as well. THEREFORE, the Motion to Dismiss is denied with leave of Counsel to file new motions addressed to the effect of the waiver.

The motion to dismiss was apparently renewed as to the Authority and was again denied on the basis of the court's finding that the Authority had waived its immunity from suit in state court.

Following this order, the Enterprise moved to intervene in the lawsuit as a party defendant pursuant to Rule 24, Arizona Rules of Civil Procedure, 16 A.R.S., on the grounds that as the principal obligor on the bonds it was an indispensable party to the lawsuit and that it was obligated to indemnify Aetna and the Authority for any judgment obtained against them. The motion was not opposed by appellant and was granted by the court. The Enterprise filed an answer, alleging inter alia lack of personal and subject matter jurisdiction, and both sides commenced discovery proceedings.

On May 9, 1983, appellant voluntarily dismissed the Authority from the lawsuit. On September 1, 1983, more than a year after the court's order granting leave to intervene, the Enterprise and Aetna filed a motion to dismiss on essentially the same grounds set forth in the prior motion of Aetna and the Authority. The court granted this motion, holding that it lacked jurisdiction over the Tribe and its agencies, and further finding that ". . . as a matter of law, the surety company cannot be sued directly . . . ." The basis for this latter holding was the court's prior finding that, since the Authority had been dismissed from the lawsuit, ". . . there is no longer a conduit from the plaintiff to the surety company."

Although this appeal was taken from the court's order dismissing the complaint as to both the Enterprise and Aetna, appellant has sought relief in this court only as to Aetna and stated in its brief that it did not oppose the motion to dismiss as to the Enterprise.

We therefore conclude that appellant has waived any claim of error as to the trial court's dismissal of the Enterprise and affirm that portion of the order, despite the substantial question presented as to whether the Enterprise's intervention in the lawsuit as a party defendant constituted a waiver of its sovereign immunity. See United States v. State of Oregon, 657 F.2d 1009 (9th Cir. 1982).

As to Aetna, appellant raises three issues: 1) whether members of the classes named in the performance-payment bonds are entitled to seek recovery on the bonds; 2) whether a surety may be sued without joinder of the principal obligor where the latter is immune from suit; and 3) whether a principal's immunity from suit is a defense which may be asserted in an action against the surety.

With regard to the first issue, we have no hesitancy in holding that appellant was entitled to seek recovery on the performance-payment bonds. In Webb Construction

Company v. Crane Company, 52 Ariz. 299, 80 P.2d 698 (1938), our supreme court quoted as "a correct statement of law" the following excerpt from 77 A.L.R., p. 83:

> The right of laborers and materialmen to recover on a bond executed in connection with public works or improvements, where the bond contains a condition for their benefit and is intended for their protection, although the public body is the only obligee named therein, and there is no express provision that such third parties shall have any rights thereunder, is affirmed by the great weight of authority. 52 Ariz. at 310.

See also Ed Stearman & Sons, Inc. v. State ex rel. Union Rock & Materials Co., 1 Ariz.App. 192, 400 P.2d 863 (1965).

The appellees concede that the Authority is a public body, but argue that there is no express condition in the bond that the Enterprise pay any materialmen and that its only obligation thereunder is to indemnify the Authority in the event that the Enterprise fails to pay such materialmen. Contrary to appellees' contentions, the provision of the bonds quoted above is indistinguishable from

that construed by the supreme court in Webb Construction Company v. Crane Company, supra. Further, the provision that ". . . no final settlement between the Owner and the Contractor shall abridge the right of any beneficiary hereunder, whose claim may be unsatisfied" clearly implies that the classes described in the bond were intended to be beneficiaries of its protection and are entitled to recover on the bond for any unsatisfied claim. Inasmuch as appellant was a third party beneficiary of the bonds, the Authority is not needed to serve as a "conduit" to the surety, and the trial court erred in dismissing the complaint as to Aetna on that basis.

Appellees raise two additional arguments in support of the trial court's dismissal of the suit as to Aetna, the first based on the doctrine of tribal sovereign immunity and the second based on the exclusive jurisdiction of tribal court.

The first argument is premised on the immunity of the Enterprise, as a subordinate

business enterprise of the Tribe, from suit in state court, a premise which must be taken as conceded by appellant for the reasons discussed above. Appellees then argue that, because Aetna is "guaranteed" subrogation rights of a judgment creditor by virtue of A.R.S. §12-1643, any judgment against Aetna in this action would in effect be a judgment against the Enterprise. We disagree. A.R.S. §12-1643 provides:

> A. When a person who is surety on an undertaking is compelled to pay a judgment or part thereof, or makes a payment upon a judgment by reason of suretyship, such judgment shall not be discharged by such payment but shall remain in force for the use of the surety and shall be considered as assigned to the surety together with all rights of the creditor thereunder to the extent of the payment made by the surety, and interest thereon.
>
> B. The surety may have execution issued on the judgment in the name of the creditor for use of such surety against the principal debtor for the full amount of the payment, interest thereon, and all costs.
>
> C. The execution shall be issued upon the application of the surety to the clerk or court, and

> shall be levied, collected and returned as in other cases.

A careful reading of the statute reveals that the surety's right of subrogation arises only where the creditor has obtained a judgment against the principal, not where the judgment runs only against the surety. See First National Bank of Albuquerque v. The Standard Accident Insurance Company, 38 Ariz. 77, 297 P. 864 (1931). Since the Enterprise's immunity from suit will preclude appellant from obtaining a judgment in this action against anyone but Aetna, no right of subrogation could arise under this statute. Further, even assuming that Aetna could overcome the obstacle of sovereign immunity in seeking to enforce a right of subrogation, since Arizona has not acquired jurisdiction over the White Mountain Apache Reservation pursuant to the Civil Rights Act of 1968, 25 U.S.C. §§ 1321-1326, the state has no authority to extend the application of its laws to Indian tribes or Indians residing on a reservation. Francisco v. State, 113 Ariz. 427, 556 P.2d 1

(1976); Nenna v. Moreno, 132 Ariz. 565, 647 P.2d 1163 (App. 1982).

Appellees further argue that, since the Tribe by resolution has agreed to indemnify Aetna for any losses suffered on the bonds, the effect of a determination that Aetna may be sued alone would be to force the Tribe to choose between 1) reneging on its agreement to indemnify, in which case it would be unable to obtain such bonds in the future, or 2) awaiting a suit by Aetna to enforce its right of indemnification in tribal court, where the Tribe would be unable to secure the attendance of persons residing outside the reservation in attempting to defend on the merits, or 3) waiving its immunity and submitting to state court jurisdiction in the present action.

We note initially that the Tribe did not intervene below and is not a party to this appeal, nor has the indemnification agreement been made part of the record before us. The resolution of the tribal council pertaining to the agreement, which is part of the record,

authorizes the tribal chairman to enter into the agreement on behalf of the Tribe, not the Enterprise. Accordingly, the Enterprise has no obligation under that agreement to indemnify Aetna for any judgment against it in this action. Further, the rights and obligations of the Tribe and Aetna under the indemnification agreement, as well as the Tribe's decision whether or not to honor the agreement, are separate and apart from the rights and obligations of appellant, Aetna and the Enterprise under the bonds, and are not an issue here. This agreement was not referenced in the bonds, and there is no evidence that appellant was even aware of its existence until the Enterprise intervened below.

A more difficult question exists, however, when the arguments presented on behalf of the Tribe are applied to the Enterprise. Under general principles of suretyship, Aetna may have an implied right of reimbursement against the Enterprise for any amounts required to be paid on the bonds as a result

of a judgment entered against it in this action. See Restatement of Security, §104 (1941). In any action to enforce that right, however, the Enterprise is free to assert the same defense against Aetna that it has asserted against appellant, i.e., its immunity from suit. Although appellees have consistently argued that both the Tribe and the Enterprise could be sued in tribal court, nothing in the record supports that contention. While the portions of the tribal code cited by appellees would support the proposition that the tribal court has subject matter jurisdiction over suits to which the Tribe or the Enterprise is a party, these provisions are not tantamount to a consent to suit, and we have been cited to no provision of the tribal code which constitutes a waiver by the Tribe or the Enterprise of their immunity from suit, regardless of the forum. Such a waiver cannot be implied, but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

Thus, while a judgment in this action against Aetna may give rise to a right of reimbursement from the Enterprise, the latter's immunity from suit may deprive Aetna of any remedy. The fact that Aetna may be denied reimbursement, however, is not a basis for dismissing appellant's claim on the bonds. In light of the fact that Aetna has held itself out as guaranteeing payment of all just claims arising out of the construction projects, we cannot countenance a denial of appellant's right of action on the performance-payment bonds simply on the basis that Aetna may have placed itself in a position where it is unable to enforce its right of reimbursement against the Enterprise. Nor should the fact that the Enterprise, which will have no liability to appellant, is faced with difficult choices arising out of its potential obligation to Aetna, preclude appellant from enforcing its own distinct rights against Aetna.

In essence, the present action concerns a suit by a non-Indian corporation on a third

party bond issued by another non-Indian corporation. Even assuming that the circumstances surrounding the execution of the bonds occurred entirely within the reservation, our state courts are not thereby automatically divested of jurisdiction to decide the case. The limitations on state jurisdiction arising out of the status of Indian tribes as dependent sovereigns relate to the authority of the states over Indians and Indian lands. In People of State of New York ex rel. Ray v. Martin, 326 U.S. 496, 66 S.Ct. 307, 90 L.Ed. 261 (1946), reaffirming prior decisions that a state has criminal jurisdiction over offenses committed by non-Indians against non-Indians within the boundaries of a reservation, the United States Supreme Court noted that "[t]he entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves in their property." 326 U.S. at 501. Further, the language of the Civil Rights Act of 1968 giving consent of the

United States to state civil jurisdiction refers only to ". . . civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State . . . ." 25 U.S.C. §1322(a). The clear implication is that the consent of the United States to state court jurisdiction over civil actions between non-Indians, even those arising within a reservation, was not required.

Nor can we agree with appellees' second argument that the existence of jurisdiction in the tribal court serves to preempt jurisdiction in state court. The cases cited in support of this argument all relate to causes of action involving individual tribal members, internal tribal affairs, or enforcement of tribal ordinances. See e.g., Santa Clara Pueblo v. Martinez, supra; Fisher v. District Court of the Sixteenth Judicial District of Montana, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706

(1975). None of these factors is present here. While it is true that the bonds were obtained pursuant to the requirements of the HUD regulations, nothing in those regulations establishes a procedure for enforcing the rights of the claimants under the bonds, much less purports to confer exclusive jurisdiction on the tribal courts. Cf. 40 U.S.C. §§270a-270d (the Miller Act). Accordingly, we find no basis for preemption of state court jurisdiction over a private cause of action in contract between two non-Indian parties.

Having concluded that the trial court did not lack subject matter jurisdiction over the action against Aetna, we must nevertheless determine whether the other grounds presented to the trial court in support of appellees' motion were sufficient to warrant dismissal of the action as to Aetna. This requires us to address the remaining issues raised by appellant, that is, whether a surety may be sued where the principal is immune from suit and

whether the surety may raise the principal's defense of sovereign immunity.

Appellees argue that appellant is estopped from contending that the Enterprise is not a necessary party to the litigation because it did not oppose appellees' motion to intervene. This argument is without merit. Appellant's acquiescence in the Enterprise's removal of an obstacle to a suit against it in state court, which appellant could not remove on its own, cannot by any stretch of the imagination be construed as an admission that the Enterprise was an indispensable party. Nor can we agree that Rule 17(f), Arizona Rules of Civil Procedure, 16 A.R.S., requires joinder of the principal under the circumstances of this case. That rule provides:

> Actions against surety, assignor or endorser. The assignor, endorser, guarantor and surety upon a contract, and the drawer of a bill which has been accepted, may be sued without the maker, acceptor or other principal obligor when the latter resides beyond the limits of the state, or in such part of the state that he cannot be reached by ordinary process of law, or when his residence is unknown and cannot be

> ascertained by the use of reasonable diligence, or when he is dead, or insolvent.

This rule, which was taken from a statute enacted prior to statehood, requires joinder of the principal in an action against a surety unless facts are shown to exist which bring the case within one of the exceptions stated in the rule. The purpose of the rule is to enable the courts to determine the rights of all parties to a controversy in one lawsuit, if possible. United States Fidelity and Guaranty Company v. Alfalfa Seed and Lumber Company, 38 Ariz. 48, 297 P. 862 (1931). Once it is shown that the principal comes within one of the enumerated exceptions, however, a plaintiff may proceed against the surety alone. First National Bank of Albuquerque v. The Standard Accident Insurance Company, supra.

Appellant argues that either the purpose of the rule has been met when it is shown that the Enterprise is immune from suit, and therefore the rule should not apply, or that

the Enterprise's immunity puts it within the exception for persons who "cannot be reached by ordinary process of law." Although we have found no cases construing this latter phrase, which has been part of the Arizona statutes since at least 1901 and has no counterpart in the federal rules, we think it was clearly intended to apply to persons who cannot be made subject to the state court's jurisdiction for whatever reason, and is broad enough to encompass the Enterprise which, although "residing" within the State of Arizona, cannot be made subject to the court's jurisdiction because of its immunity from suit. The exception having been established, joinder of the Enterprise was not required under Rule 17(f). 2/

2/ We note that, although the original motion to dismiss filed by the Authority and Aetna and denied by the trial court sought dismissal for failure to join an indispensable party under Rule 19, Arizona Rules of Civil Procedure, 16 A.R.S., this ground was not urged in the subsequent motion (continued)

Finally, the appellees contend that the Enterprise's immunity from suit inures to the benefit of its surety, and that the trial court therefore properly dismissed the complaint as to Aetna on this basis. As a general rule, a surety is not liable on a bond unless the principal is liable, and therefore the surety may set up any defense available to the principal. 74 Am.Jur.2d Suretyship §104 (1974); see Spear v. Industrial Commission, 114 Ariz. 601, 562 P.2d 1099 (App. 1977). An exception to this rule exists:

> . . . where the principal, when sued, takes advantage of a matter of

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[2] (continued)
to dismiss filed by the Enterprise and Aetna, nor has it been argued before this court. In a similar case involving contribution between Indian and non-Indian joint tortfeasors, the Supreme Court of South Dakota reversed the trial court's dismissal for failure to join an indispensable party, finding that a judgment against the non-Indian would not be res judicata as to the Indian tortfeasor and that the plaintiffs would not have an adequate alternative remedy in tribal court, where the action would be subject to a similar motion as a result of the plaintiffs' inability to join the non-Indian tortfeasor. Whiting v. Hoffine, 294 N.W.2d 921 (S.D. 1980).

> defense which is altogether of a personal character, or where the extinction of the principal's obligation arises from a cause which originates in the law. These defenses are ordinarily of such a character that the principal, as he chooses, may insist upon them or not. 74 Am.Jur.2d Suretyship §104 at 76, (1974).

Appellant argues that the defense of sovereign immunity is just such a personal defense which cannot be raised by the surety, relying on Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Department, 415 F.2d 452 (5th Cir. 1969). The plaintiff in that case sought damages for breach of a storage contract with defendant Docks Department, an agency of the State of Alabama. The plaintiff also sought to recover on the department's suretyship bond, required by statute of all public warehousemen. In holding that the surety could be sued on the bond notwithstanding the department's immunity from suit, the court concluded that the defense of immunity was analogous to the defense of incapacity to contract and therefore within the exception of

the general rule stated above. In so holding the court reasoned as follows:

> . . . Here, Gulf entered into the surety agreement knowing that Docks was a state agency and presumably could not be sued. To hold that a surety may rely on its principal's sovereign immunity to avoid payment of damages would provide a windfall to the surety. The surety would receive consideration for its promise of guaranty without assuming the concomitant risk of payment. 415 F.2d at 458.

Appellees attempt to distinguish this case on the basis that, since Aetna may be sued in tribal court, it will not receive a windfall. Appellees further argue that to preclude Aetna from asserting the Enterprise's immunity from suit will defeat the purpose of the doctrine of sovereign immunity because of the Tribe's agreement to indemnify Aetna, relying on Phelps v. Dawson, 97 F.2d 339 (8th Cir. 1938). In that case, the court rejected the argument that a deputy state fire marshall's immunity from suit was a personal privilege which could not be raised by the surety as a defense to a malicious prosecution action. The court reasoned as follows:

> . . . The sole basis of such immunity is a public policy resting entirely upon the public good to be brought about by having the official action of certain classes of public officials entirely uninfluenced by apprehension of personal civil liability. [citations omitted] To allow recovery against the surety as to such official acts would (a) result in weakening (if not entirely destroying) the effectiveness of this public policy or (b) it would make it burdensome or impossible to secure official bonds.
> . . . It is a matter of general knowledge that there are decided practical advantages in having as surety on official bonds companies which made a business of such suretyship. It is equally well known that such companies nearly always have contracts of reimbursement from the principal upon such bonds. If they have no such contracts, the law implies such. [citations omitted] . . . Therefore, the situation is that, if the surety has to pay, it turns back upon the principal--the immune official--for full reimbursement. Thus the official is liable, in a roundabout way, for the official action which this rule of public policy declares he shall not be liable for directly. Such a situation weakens, if it does not destroy, all real effect of the public policy. 97 F.2d at 342-343.

Appellees' arguments fail on two grounds. First, appellees again ignore the fact that there is nothing to prevent Aetna from raising

the same immunity argument in tribal court that it has raised in state court, and thereby obtain the sort of windfall decried by the court in Centraal Stikslot Verkoopkantoor v. Alabama State Docks Department, N.V., supra. Second, with respect to the liability of the surety, the public policy which must be considered by this court is that embodied in the HUD regulations pursuant to which these bonds were obtained and in the language of the bonds themselves, which were drafted by HUD. While it is clear that a major purpose of the bonds was to protect the Authority from liability resulting from the default of its general contractor, it was also their purpose to protect third parties supplying labor and materials for these projects and to ensure that their just claims were paid. In light of this policy, as well as the fact that the Tribe and its economic enterprises remain immune from any suit by Aetna for indemnification, we hold that Aetna may not raise the sovereign immunity of the Tribe or the

Enterprise as a defense to this action, and that the appellant's complaint may not be dismissed on this basis. In so holding, we note that Aetna's position in entering into these surety agreements was no different than that of Gulf in Centraal Stikstof Verkoopkantoor, N.V. v. Alabama State Docks Department, supra. Aetna must surely have been aware of the immunity of its principal from suit, and could have taken steps to protect itself, for example, by requiring the Enterprise and the Authority to identify all subcontractors and suppliers and to obtain releases from the latter prior to final payment. Having failed to do so, it cannot now escape its obligations under the bond under the guise of sovereign immunity.

The order of the trial court dismissing the complaint as to the Enterprise is affirmed. The order of the trial court dismissing the complaint as to Aetna is reversed, and the cause is remanded for further proceedings.

BEN C. BIRDSALL, Chief Judge

CONCURRING:

JAMES D. HATHAWAY, Judge.

LAWRENCE HOWARD, Judge.

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GILA

SMITH PLUMBING COMPANY, INC., an Arizona corporation, dba WHITE MOUNTAIN SUPPLY COMPANY, Plaintiff, vs. AETNA CASUALTY & SURETY COMPANY, a Connecticut corporation, Defendants, and WHITE MOUNTAIN APACHE TRIBE, dba APACHE DEVELOPMENT ENTERPRISE, Defendant/Intervenor.	F I L E D DEC. 7, 1983 NO. CIV 23528 O R D E R

This matter coming on for a hearing pursuant to a Motion to Dismiss filed by the Intervenor/Defendant White Mountain Apache Tribe doing business as the White Mountain Apache Development Enterprise and Defendant Aetna Casualty & Surety Company and the Defendants being represented by Counsel appearing in open court and the Plaintiff, Smith Plumbing Company, Inc. having filed a Response to the Defendant's Motion to Dismiss, and being represented by counsel, and oral

arguments having been heard and the Motion to Dismiss having been taken under advisement and the court, having examined the surety agreement and authorities submitted by the parties, finds that the court does not have jurisdiction over the White Mountain Apache Tribe or its agencies; and, further, the court notes that the White Mountain Apache Housing Authority has been dismissed from the case and therefore finds that there is no longer a conduit from the plaintiff to the surety Company.

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the court does not have jurisdiction over the White Mountain Apache Tribe or its agencies and therefore grants the Motion to Dismiss as to the intervenor White Mountain Apache Tribe doing business as the White Mountain Apache Development Enterprise.

IT IS FURTHER ORDERED, DECREED AND ADJUDGED that as a matter of law, the surety company cannot be sued directly and therefore

the Motion to Dismiss Aetna Casualty & Surety Company is hereby granted.

DONE IN OPEN COURT this 7th day of December, 1983.

/s/ Edward L. Dawson
Judge

APPENDIX E.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF GILA

SMITH PLUMBING COMPANY, INC., an Arizona corproation, dba WHITE MOUNTAIN SUPPLY, COMPANY,	F I L E D JAN. 22, 1982
Plaintiff,	NO. CIV 23528
vs.	MOTION TO DISMISS ON BEHALF OF WHITE MOUNTAIN APACHE HOUSING AUTHORITY, AETNA CASUALTY AND SURETY COMPANY, AND WHITE MOUNAPACHE TRIBE (SPECIAL APPEARANCE)
WHITE MOUNTAIN APACHE HOUSING AUTHORITY, and AETNA CASUALTY & SURETY COMPANY, a Connecticut corporation,	
Defendants.	

The Defendants, White Mountain Apache Housing Authority and Aetna Casualty and Surety Company, without submitting to the jurisdiction of the Superior Court of Gila County, and the White Mountain Apache Tribe, which has not been named in this lawsuit; but who is an indispensable party to the lawsuit if relief is to be obtained against the named defendants, White Mountain Apache Housing Authority and Aetna Casualty and Surety

Company, without submitting to the jurisdiction of this Court, hereby suggests to this court by means of a motion to dismiss, that it is without jurisdiction over the defendants and subject matter of the Complaint.

The Motion to Dismiss on behalf of the above-named defendants and un-named indispensable parties [sic], White Mountain Apache Tribe, is made pursuant to the following sections of Rule 12(b) of the Arizona Rules of Civil Procedure:

1. Lack of jurisdiction over the subject matter;

2. Lack of jurisdiction over the parties;

3. Improper venue;

4. Insufficiency of process;

5. Insufficiency of service of process;

6. Failure to state a claim upon which relief can be granted.

This Motion to Dismiss is also made pursuant to Rule 19, Arizona Rules of Civil

Procedure for failure to join an indispensable party, namely the White Mountain Apache Tribe doing business as White Mountain [Apache] Development Enterprise. This motion is supported by the attached memorandum of points and authorities and exhibits. . . .

VIII

Conclusion

. . . Additionally, the contracts between the Housing Authority and the Development Enterprise, the subcontract between the Development Enterprise and GS&D, the plumbing subcontractor (Exhibit "D"); and the performance Bond contract between the Development Enterprise and the subcontractor were all entered into at Whiteriver, Arizona, within the exterior boundaries of the Fort Apache Indian Reservation.

All labor, construction and the HUD projects themselves were performed at Cibecue Village within the exterior boundaries of the reservation.

It is absolutely clear that jurisdiction over the parties and the subject matter lies not in state court, but the Tribal Court of the White Mountain Apache Tribe. The present suit should be dismissed.

RESPECTFULLY SUBMITTED this 20th day of January, 1982.

/s/ Robert C. Brauchli
Attorney for
White Mountain Apache
Housing Authority, Aetna
Casualty and Surety
Company, White Mountain
Apache Development
Enterprise and the White
Mountain Apache Tribe

Copy of the foregoing mailed
this 20th day of January, 1982,
to:

Vernon L. Nicholas
9 West Pepper Place
P.O. Box 1467
Mesa, Arizona 85201

By /s/ Robert C. Brauchli

Supreme Court, U.S.
FILED
NOV 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-588

In The
Supreme Court of the United States
October Term, 1986

AETNA CASUALTY & SURETY COMPANY,
a Connecticut Corporation,

Petitioner,

v.

SMITH PLUMBING COMPANY, INC., an Arizona Corporation, dba WHITE MOUNTAIN SUPPLY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

1. Whether petitioner has standing to assert the legal rights or interests of a third party, i.e., that the exercise of state court jurisdiction over petitioner as surety on a bond on which a development enterprise of an Indian tribe is the principal will infringe upon tribal self-government.

2. Whether an incident of the federal policy underlying the requirement of a performance and payment bond on Indian housing projects is that a beneficiary of such a bond may bring an action thereon in state court against the surety.

3. Whether allowing a beneficiary of a performance and payment bond on an Indian housing project to bring an action thereon in state court against the surety infringes upon tribal self-government.

RULE 28.1 LISTING

Respondent Smith Plumbing Company, Inc. is a closely held Arizona corporation doing business as White Mountain Supply Company and has no parent company or any subsidiaries or affiliates.

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STATEMENT OF THE CASE

Respondent hereby incorporates the facts recited in the opinions below. With regard to petitioner's statement of the case, it should be clarified that respondent supplied construction materials *outside* the reservation. (Appendix to Petition 59a). Furthermore, the tribal council indemnification resolution did not indemnify petitioner. Instead, it merely authorized the tribal chairman to enter into an indemnification agreement. However, no such agreement is a part of the record below. (Appendix to Petition at 44a, 68a-69a).

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner lacks standing to raise the question presented in the petition.

This Court has held that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). That rule applies equally where a litigant asserts the rights of third parties defensively, as a bar to judgment against him. *E.g., McGowan v. Maryland,* 366 U.S. 420, 429-430 (1961).

Aetna Casualty & Surety Company, the sole petitioner herein,[1] argues in the petition (p. 15) that "state assump-

1. Although the White Mountain Apache Tribe dba Apache Development Enterprise intervened below, the Enterprise successfully moved the trial court for dismissal of the action

(Continued on following page)

tion of jurisdiction [over Aetna] infringes upon the tribe's right of self-government." Petitioner does not argue that the decision below violates any of petitioner's legal rights or interests. Inasmuch as petitioner cannot assert the personal defenses of its principal (Appendix to Petition at 8a-9a),[2] petitioner has no standing to contend that a judgment against it will infringe its principal's rights.

2. An incident of the federal policy requiring a performance and payment bond on Indian housing projects is that a beneficiary of such a bond may bring an action thereon in state court against the surety.

Petitioner ignores the fact that the decision below promotes the federal policy underlying the requirement that contractors building Indian housing furnish performance and payment bonds. That policy, discussed more thoroughly in the decision below (Appendix to Petition at 25a-34a), facilitates the construction of Indian housing by providing bonding protection so as to encourage subcontractors and suppliers to participate in such construction projects. To further that policy, beneficiaries of the required

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(Continued from previous page)

against it. On appeal, respondent sought relief only against petitioner, and the dismissal as to the Enterprise was affirmed. The Enterprise has not petitioned for certiorari, and as a successful party, has no standing to do so. *E.g., see Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) ["A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it."].

2. Petitioner's footnote contention (Petition, n. 8 at pp. 15-16) that the Arizona Supreme Court erroneously held that sovereign immunity is a personal defense is not encompassed by the Question Presented.

bonds must have the same rights as they would when dealing in the private sector, i.e., the right to sue on the bonds in state court.

3. Allowing a beneficiary of a performance and payment bond on an Indian housing project to bring an action thereon in state court against the surety does not infringe upon tribal self-government.

Petitioner misinterprets *R.J. Williams Co. v. Fort Belknap Housing Auth.*, 719 F.2d 979 (9th Cir. 1983), in arguing that the adjudication of respondent's claim against the subject bond in state court would infringe upon tribal self-government. To reach that conclusion, petitioner contends that such an action interferes with the tribe's interest in self-government in one of the two ways described in *R.J. Williams*, namely, that:

> "the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body . . . ."

719 F.2d at 983. The "act" in question, according to petitioner, is the Tribe's ultimate payment of respondent's claim. However, petitioner's argument puts the cart before the horse because respondent's action cannot call into question an act that has yet to occur. Moreover, respondent's action does not challenge the "validity or propriety" of the Tribe's ultimate payment of respondent's claim. Accordingly, there is no infringement of tribal self-government in the manner set forth in *R.J. Williams*.

Secondly, contrary to petitioner's argument, the entry of judgment against petitioner will not bind the Tribe, and therefore, will not infringe upon tribal self-government. Although a judgment against a surety may ordi-

narily bind the principal, the principal herein, the Tribe's development enterprise, retains its sovereign immunity despite the entry of judgment against petitioner. Because the Tribe will not be bound by a judgment against its surety, the Tribe will not be compelled to defend its surety in state court.

If the Tribe will be bound by a judgment against petitioner, and therefore feels compelled to defend its surety, it will only be because the Tribe was contractually or otherwise obligated to indemnify its surety *and* had waived its sovereign immunity to suit by petitioner. In that case, respondent's state court action against petitioner cannot be said to infringe tribal self-government inasmuch as the Tribe is subject to suit by petitioner for indemnification.

Incidentally, petitioner's footnote reference in the petition (n. 9 at pp. 16-17) to *Ramey Const. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315 (10th Cir. 1982), is in error. Whether a surety may assert its principal's sovereign immunity as a defense was not an issue in *Ramey*. Nevertheless, petitioner surmises that the claim against the surety in *Ramey* was dismissed and that it was dismissed on the basis that the surety was entitled to assert the sovereign immunity of its principal. However, the opinion does not discuss any adjudication of the claim against the surety and what petitioner surmises is not necessarily true. Partial summary judgment was entered against the tribal defendants for the withheld retainage under the construction contract. Although the nature of the claim against the surety is not stated, the retainage claim was possibly the only claim against the

surety inasmuch as the scope of the payment and performance bond therein likely did not include the interest and consequential damages claimed against the tribal defendants. Therefore, it is equally possible to surmise that the action against the surety was concluded by summary judgment for the plaintiff.

Finally, although respondent disagrees that it had a commercial relationship with the Tribe or that it performed any act submitting it to the jurisdiction of the tribal court, whether either is true is immaterial to whether a state court action against the Tribe's surety infringes upon tribal self-government.

—o—

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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